

FILED
Clerk
District Court

DEC 15 2005

For The Northern Mariana Islands
By _____
(Deputy Clerk)

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Attorney for Defendant Fermin M. Atalig

IN THE FEDERAL DISTRICT COURT
 FOR THE
 DISTRICT OF THE NORTHERN MARIANA ISLANDS

ROSARIO DLG KUMAGAI,

Plaintiff,

vs.

PAMELA BROWN, a.k.a. PAMELA
 BROWN BLACKBURN personally and in
 her official capacity as the Attorney General
 for the Commonwealth of the Northern
 Mariana Islands; FERMIN ATALIG,
 personally and in his official capacity as the
 Secretary of Finance, Commonwealth of the
 Northern Mariana Islands; MARIA
 LOURDES SEMAN ADA, personally and
 in her official capacity as the Executive
 Director for the Commonwealth
 Development Authority; COMMONWEALTH
 DEVELOPMENT AUTHORITY; BANK
 OF GUAM; and JOHN DOES ONE through
 TEN,
 Defendants.

CIVIL ACTION
 NO. 05-0037

MOTION TO SET
 ASIDE ENTRY OF
 DEFAULT PURSUANT
 TO FED. R. CIV. PRO.
 55(C) on behalf of
 FERMIN ATALIG

MEMORANDUM OF POINTS
 AND AUTHORITIES IN
 SUPPORT OF MOTION

1 Now comes Fermin M. Atalig, Secretary of Finance, Commonwealth of the Northern
2 Mariana Islands, by Assistant Attorney General Kevin A. Lynch, and moves this Court to set
3 aside the Entry of Default against him in this matter for the following reasons:

4 1. Secretary Atalig is sued in this case in his official and personal capacities. Because the
5 acts complained of occurred in the course of Secretary Atalig's duties as Secretary of Finance, he
6 is entitled to legal assistance by virtue of the Public Employee Legal Defense and
7 Indemnification Act of 1986, 7 CMC § 2301 *et seq.*

8 2. The Complaint and Demand for Jury was received by the Office of the Attorney General
9 on Nov. 9, 2005. However, Secretary Atalig did not request legal representation from the
10 Attorney General's Office until December 9, 2005. The undersigned counsel was assigned the
11 case on the afternoon of Dec. 13, 2005, and immediately commenced reviewing the case and its
12 procedural posture.

13 3. A default was entered on Nov. 30, 2005 due to Secretary Atalig's failure to answer the
14 Complaint within 20 days after service.

15 4. Secretary Atalig seeks to set aside the entry of default under the three-part standard
16 articulated in *Falk v. Allen*, 739 F. 2d 461, 463 (9th Cir. 1984), as discussed in the Memorandum
17 of Points and Authorities below.

18 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SETTING ASIDE
19 THE ENTRY OF DEFAULT.
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21 It is black-letter law that entry of default is disfavored, while trial on the merits is
22 strongly preferred. *Falk v. Allen*, 739 F. 2d 461, 463 (9th Cir. 1984), *accord*, *Zawadski de Bueno*
23 *v. Bueno Castro*, 822 F. 2d 416, 420 (3rd Cir. 1987), *In re Arthur Treacher's Franchise*
24

1 *Litigation*, 92 F.R.D. 398, 418 (D.C. Pa. 1981). For this reason, motions to set aside a default are
2 to be liberally granted. *Manufacturer's Industrial Relations Ass'n v. East Akron Casting Co.*, 58
3 F. 3d 204, 208 (6th Cir, 1995). In addition, a mere entry of default, as we have here, is more
4 easily set aside than an actual default judgment because it is subject to the "good cause" standard
5 found in Rule 55(c), rather than the stricter standard found in Rule 60(b). *Id.*, accord *Rasmussen*
6 *v. American Nat. Red Cross*, 155 F.R.D. 549, 550 (S.D. W. Va. 1994).

7 Courts generally apply a three part test in determining whether an entry of default
8 or a default judgment should be set aside. *Falk*, 739 F. 2d at 463. The three factors are:
9 "whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense,
10 and (3) whether culpable conduct of the defendant led to the default." *Id.* In applying these three
11 factors, a court must keep in mind that these factors "are to be applied more liberally when
12 reviewing an entry of default," than when considering a default judgment. *East Akron Casting*
13 *Co.*, 58 F. 3d at 208.

14 The first factor is prejudice to the plaintiff. The Secretary asserts that the Plaintiff will not
15 be prejudiced by setting aside the entry of default. The Ninth Circuit views prejudice in terms of
16 whether set aside the default would hinder the ability of the plaintiff to pursue her case. *Id.*
17 Here, the entry of default was made in the twenty-first day after service of the Summons, and
18 this Motion is made approximately five weeks after service. Setting aside the entry of default
19 will merely put the Plaintiff in a position of having to prove her allegations to the Court, as she
20 would have to do had the default not entered.

21 The second factor concerns whether the defendant has a meritorious defense. The
22 Secretary asserts, among other defenses, the defense of qualified immunity for acts done in his

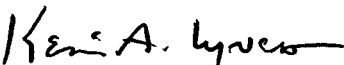
1 official capacity. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396
 2 (1982). Application of this defense would act as a bar to any recovery by Plaintiff.

3 The third factor asks whether culpable conduct by the defendant led to the default.
 4 “When the issue is one of whether to set aside an entry of default so that the “good cause”
 5 standard of Rule 55(c) is applicable, it is not absolutely necessary that the neglect or oversight
 6 offered as a reason for delay in filing a responsive pleading be excusable.” *Rasmussen, supra*,
 7 quoting *Broglie v. Mackay-Smith*, 75 F.R.D. 739, 742 (W.D.Va.1977) A portion of the delay in
 8 answering the Complaint is due to the Secretary being off island on Rota for approximately one
 9 week following the general election on November 5. In addition, during the time the clock was
 10 running down on the filing of the Answer the financial affairs of the Commonwealth demanded
 11 the Secretary’s attention. Finally, the Secretary needed to request the assistance of the Attorney
 12 General’s Office in providing legal representation on this complex matter.

13 RELIEF REQUESTED

14 For the foregoing reasons, the Fermin Atalig, the Secretary of Finance for the
 15 Commonwealth of the Northern Mariana Islands requests that this Court set aside the entry of
 16 default as permitted by Fed. R. Civ. Pro 55 (c) and allow him the answer the Complaint.

17 Respectfully Submitted,

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20 Kevin A. Lynch F0230
 21 Assistant Attorney General
 22 Attorney for Fermin Atalig
 23
 24
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Dated this 15th day of December 2005